BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUDY A. FOSTER	)	
Claimant	)	
	)	
VS.	)	
	)	Docket No. 237,486
AUTOMOTIVE CONTROLS CORP.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appealed Administrative Law Judge Jon L. Frobish's Award dated December 12, 2001. The Board heard oral argument on June 4, 2002. Gary M. Peterson was appointed as Board member pro tem for the purpose of determining this matter.

APPEARANCES

Claimant appeared by her attorney, Roger A. Riedmiller of Wichita, Kansas. The self-insured respondent appeared by its attorney, Garry W. Lassman of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined claimant suffered accidental injury on April 15, 1998, arising out of and in the course of her employment and awarded her a 26.5 percent work disability based upon a 45 percent wage loss and an 8 percent task loss.

Claimant requested review and argues the task loss component of the work disability formula should be based upon an average of the task loss opinions provided by Drs. Philip R. Mills and Pedro A. Murati.

On review respondent argues claimant did not meet her burden of proof to establish she suffered personal injury by accident arising out of and in the course of employment on April 15, 1998. In the alternative, respondent argues claimant should be limited to her functional impairment provided by Dr. Mills or if a work disability is awarded it should be based upon Dr. Mills' task loss and a 23 to 29 percent wage loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent in August 1993 and was employed as a production worker or assembler. On April 15, 1998, she began working on a riveting machine she had never operated. The work was performed at waist level but the buttons to activate the machine were above shoulder level. Claimant was having problems with the proper height of her chair in order to run the machine. Claimant testified the table was too low and the machine was so old that you had to hit the buttons, which were above shoulder level, several times to activate the machine.

Over the next few weeks claimant began experiencing a burning sensation across her shoulders as well as numbness. She couldn't turn her head and her arms and hands were going numb. Claimant reported her injury to her supervisor and was referred to the plant nurse. The nurse advised the claimant that her pain was not job related but was instead due to claimant's previous neck surgery. Claimant continued working and continued to have problems with her neck. The last day the claimant worked on the riveting machine was May 12, 1998.

Claimant had a history of prior upper extremity and neck problems before the April 15, 1998, transfer to the riveting machine. In 1995, claimant had carpal tunnel surgery. Claimant had a cervical diskectomy and fusion at C5-6 in May 1997. After her neck surgery claimant returned to work performing her regular job duties. When her job changed to operating the riveting machine she began experiencing progressively worsening neck pain.

After claimant quit operating the riveting machine on May 12, 1998, she received treatment from Dr. Robert M. Osborn. Dr. Osborn ultimately concluded claimant suffered neck and shoulder problems due to fibromyalgia caused by her repetitive work activities. Dr. Osborn referred claimant for treatment with Dr. Christopher G. Covington, the neurosurgeon who had performed her neck surgery. Dr. Covington examined claimant, reviewed the results of a new MRI and concluded her neck and shoulder pain was not related to the neck surgery. Dr. Covington opined claimant suffered fibromyalgia pain in her shoulder girdle and neck as a result of her work activities.

Respondent referred claimant to Dr. Kevin D. Komes for an examination on November 20, 1998. Dr. Komes diagnosed myofascial pain syndrome and concluded that because claimant's work activities were mild and her preexisting problems were significant, that her problems were due to her preexisting cervical condition. Dr. Komes agreed that claimant's work activities aggravated her preexisting condition but he concluded such aggravation was temporary.

The ALJ referred claimant to Dr. C. Reiff Brown for an independent medical examination. Dr. Brown diagnosed claimant with myofascial pain syndrome which resulted in the scapular, upper thoracic and upper trapezius pain as a result of claimant's work activities beginning April 15, 1998. Claimant was later referred to Dr. Mills for an additional court ordered independent medical examination. Dr. Mills also diagnosed myofascial pain syndrome in the upper trapezius distribution and concluded there was a causal relationship between claimant's complaints and her work activities.

The first issue to address is whether claimant suffered accidental injury arising out of and in the course of employment. Because of claimant's prior neck surgery, respondent argues that the neck pain claimant suffered was an ongoing problem related to that surgery and not the result of a new accidental injury.

The ALJ noted that the majority of the medical evidence supported claimant's assertions that the work activities were the cause of her increased symptoms and resulted in additional injury. The Board agrees.

After claimant's neck surgery in 1997 she returned to work for respondent and was able to perform her work duties until she was transferred to the riveting machine on April 15, 1998. As a result of those repetitive work activities the claimant developed progressively worsening pain in her neck and shoulders as well as her hands. Both treating physicians and both court ordered independent medical examiners attributed claimant's condition to her repetitive work activities. The claimant has met her burden of proof to establish she suffered a work-related accidental injury arising out of and in the course of her employment.

Nature and Extent of Disability

The claimant's attorney referred her to Dr. Murati on June 21, 2000, for an evaluation and rating. Dr. Murati diagnosed the claimant with neck pain secondary to strain, bilateral shoulder strains, right thumb pain secondary to de Quervain's and hand pain secondary to multiple trigger fingers. Dr. Murati placed permanent restrictions based on an 8-hour day upon the claimant which included no climbing ladders and crawling, no heavy grasp, no repetitive grasp/grab and no repetitive hand controls, no above-shoulder level work, no work more than 18 inches from the body, no use of hooks, knives or vibratory tools, avoid awkward positions of the neck, use good body mechanics at all times, no lifting greater than 10 pounds, occasionally lifting 10 pounds, frequently lifting 5 pounds,

constantly lifting nothing. Dr. Murati opined that, based upon the AMA *Guides*[1], the claimant suffered a 15 percent whole person impairment.

Dr. Mills diagnosed claimant with a preexisting carpal tunnel syndrome treated surgically with residual hand pain; preexisting cervical surgery with fusion; myofascial pain syndrome in the upper trapezius distribution; and depression. After reviewing the functional capacity evaluation, Dr. Mills restricted the claimant from occasional lifting in the medium category as defined by the *Dictionary of Occupational Titles*. Dr. Mills opined that, based upon the AMA *Guides*, the claimant suffered a 2 percent whole person impairment.

Dr. Brown diagnosed claimant with myofascial pain syndrome and imposed permanent restrictions: (1) avoid frequent use of the hands above the shoulders or reach away from the body more than 18 inches; (2) no lifting from the waist to the shoulders more than 20 pounds occasionally, 10 pounds frequently and 1 or 2 pounds constantly; and, (3) claimant should alternate sitting, standing and work activities. Dr. Brown opined claimant had suffered a 5 percent whole person impairment.

The Board finds that these physicians, under the circumstances and facts of this case, simply disagree regarding claimant's permanent functional impairment rating. All of the physicians utilized the AMA *Guides* in determining claimant's permanent functional impairment as required by statute. The Board finds that the physicians neither misapplied nor misinterpreted the AMA *Guides* to a point that their opinions should be disregarded. These physicians simply disagreed not only as to the extent of claimant's permanent impairment but they also made different diagnoses in regards to claimant's condition as a result of her injuries.

The Board, therefore, concludes the physicians' functional impairment ratings should be given equal weight in determining the appropriate impairment of function. Accordingly, the Board finds claimant has a 7 percent permanent functional impairment.

Because claimant's injuries comprise an "unscheduled" injury, her permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment . . . An employee shall not

[1] American Medical Ass'n *Guides to the Evaluation of Permanent Impairment* (4th ed.)

> be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of injury.

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages . . .[4]

The claimant has not attempted to find any employment after leaving work for respondent. Her permanent restrictions would not prevent claimant from seeking gainful employment. The Board adopts the ALJ's conclusion that claimant has not made a good faith effort to find employment. Consequently, the Board will impute a wage based upon all the evidence including expert testimony regarding claimant's capacity to earn wages.

Mr. Jerry Hardin, a vocational consultant, opined that based upon Dr. Mills' restrictions claimant had the capacity to earn between $6 and $6.50 an hour. Utilizing Dr. Murati's restrictions claimant had the capacity to earn between $5.50 and $6 an hour. The Board concludes claimant has the capacity to earn $6 an hour or $240 a week. Consequently, claimant's wage loss would be 36 percent.

Turning to the task loss component of the work disability formula there was physician testimony regarding task loss as required by the statute. Dr. Mills utilized the task list provided by Mr. Hardin and, after elimination of duplicate tasks, concluded claimant could no longer perform 7 of 44 tasks which results in a 16 percent task loss. When Dr. Mills utilized the task list provided by Karen Terrill, he concluded claimant could no longer perform 5 of 60 tasks which results in an 8 percent task loss.

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Copeland*, at 320.

The ALJ did not include the task loss opinions offered by Dr. Murati. The Board concludes Dr. Murati's task loss opinions should be given equal weight. It should be noted that Drs. Murati and Brown, one of the court ordered independent medical examiners, both imposed similar restrictions.

Dr. Murati, utilizing the task list provided by Mr. Hardin, after elimination of duplicate tasks, concluded claimant could no longer perform 31 of 44 tasks which results in a 70 percent task loss. Utilizing the task list provided by Ms. Terrill, Dr. Murati concluded claimant could no longer perform 33 of 60 tasks which results in a 55 percent task loss.

Giving equal weight to the opinions using the different task lists the Board concludes claimant has suffered a 37 percent task loss. Averaging the 36 percent wage loss with the 37 percent task loss results in a 36.5 percent work disability. The Board finds the claimant has met her burden of proof to establish a 36.5 percent work disability.

Respondent further contends, under K.S.A. 44-501(c), that it is entitled to a credit for any preexisting impairment claimant may have suffered to her hands or neck. K.S.A. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

K.S.A. 44-510e requires that functional impairment be determined based upon the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria.[5] In the absence of physician testimony regarding claimant's preexisting condition and utilization of the AMA *Guides* (4th ed.) when determining that preexisting condition, the Board finds that respondent has failed in its burden of proving what, if any, preexisting functional impairment claimant may have suffered. Therefore, an offset under K.S.A. 44-501(c) is denied.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Jon L. Frobish dated December 12, 2001, is modified to reflect that claimant is entitled to a 36.5 percent work disability.

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[5] *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003) (copy attached pursuant to Sup. Ct. Rule 7.04).

The claimant is entitled to 151.48 weeks permanent partial compensation at the rate of $248.65 per week or $37,665.50 for a 36.5 percent work disability which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of May 2003.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Garry W. Lassman, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation